

Assembly Bill 1791 (Runner)
Fine Prohibition; Disclosure of Economic Interests

Version: As amended, March 21, 2002

Status: Assembly Elections Committee

Set for hearing: April 2, 2002

Summary of Bill

- 1) Amends Government Code Section 83116 by prohibiting the Commission from issuing an order that requires a state or local government agency to pay a monetary penalty.
- 2) Adds Section 87300.5 requiring that each state agency adopt a "Code of Ethics", to be promulgated by the Commission, setting forth the obligations and responsibilities of each public official and designated employee.
- 3) Narrows section 87302, which currently sets forth the requirements for state and local agencies' conflict-of-interest codes, to apply to local agencies only.
- 4) Adds section 87302.2, setting forth requirements for state agencies' conflict-of-interest codes that mirror those found in section 87302 (existing law), but adds the following provisions:
 - a) Requires each designated employee to file a statement of economic interest (SEI) on his or her first day of employment, and to sign a form acknowledging receipt of the agency's conflict-of-interest code.
 - b) Requires that designated employees' SEIs shall be reviewed by the agency secretary, director, or a designee, who must sign an acknowledgement of each employee's SEI.
 - c) Requires employees to sign confidentiality agreements when they participate in negotiating a contract with a value of \$500,000 or more. Requires that the agency, department, or the Department of General Services (DGS) review these employees' SEIs.
- 5) Adds Section 87302.5 requiring the Commission to be the repository for all state agency conflict-of-interest codes and for designated employees' SEIs.
- 6) Requires the Commission to provide an online system for the electronic filing of state officials' and designated state employees' SEIs, and to provide public access to those filings via the Internet. Provides a \$1.5 million appropriation for this purpose.

Existing Law and Regulations

Section 87300 of the Political Reform Act (the "Act") requires that each agency adopt a conflict-of-interest code. Section 87302 sets forth the required provisions of the conflict of interest code. Incompatible activities are regulated by the Department of Justice pursuant to Government Code section 19990. Finally, top-level appointees and staff in all executive branch agencies must take the ethics course that includes a discussion of conflicts of interest under the Act.¹

¹ See Government Code § 11146.3.

Discussion and Policy Considerations

Proposed section 83116(d) would be added to the Act to provide as follows:

“The commission may not issue an order that requires a state or local governmental agency to pay a monetary penalty pursuant to subdivision (c).”

This proposed prohibition on fining public agencies would leave the Commission unable to enforce several provisions of the Act—including sections 81010 (filing officer duties), 89001 (prohibition on mass mailings at public expense), and the reporting requirements of Chapter 4—against public agencies. Specifically, this bill would have prohibited seven past FPPC enforcement actions against state and local agencies, totaling \$106,000 in fines. (See Attachment 1 for a summary of these cases.) In addition, this prohibition conflicts with Government Code section 825.² Under that section, public employees are indemnified against any claim or action for injury arising out of an act or omission occurring within the scope of their employment. Since section 825 shifts fines levied against employees to the agency that employs them, this bill would effectively prohibit enforcement of the Act, not only against governmental entities, but against their employees acting in the scope of their employment as well.

Proposed section 87300.5, requiring a code of ethics, would be added as follows:

“Each *state* agency shall adopt a standard Code of Ethics to be promulgated by the commission pursuant to this article, as amended, setting forth the obligations and responsibilities of each public official and designated employee under this article. The commission shall adopt the Code of Ethics no later than January 1, 2004.”

It is not clear what is intended by a “Code of Ethics,” how it would differ from a conflict-of-interest code or the statement of incompatible activities already required of state agencies, which contain information about disclosure, disqualification, gift limits, loan restrictions, etc., or what its requirements might be. It is additionally unclear whether section 87300.5 would require the Commission to develop the code for each agency, or merely publish the codes once the agency has developed them.

Proposed section 87302.2, setting forth separate provisions for state agency conflict-of-interest codes, would add the following requirements:

“The written description and standards for determination of the reporting requirements for designated employees shall be a public document available to the public and the

² Government Code § 825 states: “(a) Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity **shall** pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.” (emphasis added)

designated employees no later than the first day of employment of a designated employee.”

It is unclear if the written description and standards for determination are to be part of the conflict-of-interest code. If they are not part of the code, this language should not be in section 87302.2, which sets forth the contents of a conflict-of-interest code. If the written description and standards are to be included in the code, agencies will not be able to comply with this section because it will require them to amend their codes prior to filling any new classification. This is inconsistent with the Act’s requirements for adopting amended conflict-of-interest codes, which include a public comment period and review by the code-reviewing body prior to the time the code takes effect.

Proposed section 87302.2(b) would provide that each conflict-of-interest code adopted by state agencies shall contain the following provisions:

“Requirements that each designated employee, other than those specified in Section 87200, file a statement on the designated employee’s first day of employment...”

Since passage of Proposition 9 in 1974, the Act has allowed most new employees a 30-day window in which to file their initial SEIs. Changing that long-standing requirement would be impractical, as new employees would have a difficult time completing their SEIs on the first day of employment. Frequently employees must consult financial records, financial consultants, accountants, spouses, etc., before they have the information to complete their SEIs. The Commission’s Technical Assistance Division is also frequently consulted to answer questions about disclosure requirements. While first-day filing of an SEI is problematic, the Commission is renewing the issue of how those timelines work in the contexts of newly created agencies and newly hired consultants. (See Page 10 of Item 5, “Project Proposals—Conflict of Interest Codes and SEIs, this agenda.) For this reason, this proposal is premature.

This provision would also create a double standard in that Section 87200³ filers would have 30 days to complete their SEIs. This is particularly anomalous since these filers are elected and appointed officials who make the highest level of public decisions

Proposed section 87302.2(b)(1) would require employees to sign a statement acknowledging receipt of the agency’s conflict-of-interest code and requires agencies to review these forms and the statements of economic interests filed by designated employees. Rather than mandating that employees fill out a new and separate form, it would be more appropriate to include this statement on SEIs. Additionally, the portion of this subdivision that requires agency review and

³ Government Code § 87200 states: “This article is applicable to elected state officers, judges and commissioners of courts of the judicial branch of government, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and to candidates for any of these offices at any election.”

retention of this information should not be in section 87302.2, but perhaps in a new section, similar to 81010, that spells out the duties of agencies. Even with that drafting change, it is unclear how this review would differ from the review already required by each agency under Regulation 18115.

Proposed section 87302.2(d) would require an agency's conflict-of-interest code to require designated employees who negotiate contracts with a value of \$500,000 or more to sign confidentiality agreements and pledge to disqualify themselves from participating in decisions in which they have a conflict of interest.

First, this provision may be logistically problematic in those instances in which the amount of a contract is not known until negotiations are either underway or completed. Secondly, it is unclear what deterrence the requirement to sign a pledge would provide that is not already provided by the SEI disclosure requirement, the disqualification requirement of section 87100, and the severe penalties provided by Government Code section 1090. In addition, the confidentiality portion of this provision may give rise to a First Amendment challenge.

Proposed section 87302.2(e) would require agency secretaries, department directors or other authorized staff to review SEIs, filed by designated employees who participate in negotiating contracts with a value exceeding \$500,000, for potential conflicts of interest. The review would include a written finding, sent to the Commission within 30 days following the conclusion of those negotiations, regarding potential conflicts-of-interest.

This requirement also seems logistically problematic. While it requires findings of "potential conflicts," it requires an after-the-fact review that appears more of a compliance audit than a preventative measure. To this extent, the Franchise Tax Board may be the more appropriate reviewer. In any event, the Commission would need additional funding in order to handle the increased workload and "priority review and enforcement" the bill requires.

Proposed section 87302.5 would make the Commission the repository for all state agency designated employees' SEIs. The Commission is currently the filing officer for all 87200 filers, as well as multi-county agencies, and serves as repository for approximately 20,000 SEIs. This bill would make the Commission the repository for an estimated 150,000 additional SEIs. The Commission would need a budget augmentation to hire additional staff to process and maintain the additional SEIs.

Proposed section 87600 would be known as the "Online Conflict of Interest Disclosure for State Officials and Employees Act of 2002." This section would provide the Commission with \$1,500,000 to develop, in consultation with the Secretary of State, an online SEI filing system, accessible to the public via the Internet, to be operational on July 1, 2004.

The Act provides that the Commission is solely responsible for enforcing and administering the economic interest disclosure and conflict-of-interest statutes. The Secretary of State has no statutory duties in this area. For these reasons, it is inappropriate that the online SEI system be developed in consultation with the Secretary of State.

The Commission is currently conducting a feasibility study related to online filing of SEIs. Staff's view is that SEIs will inevitably be accessible to the public online; it is simply a matter of who will control the data. The Commission receives many requests every year for copies of SEIs. Two recent examples include a reporter's request for the filings of "all state elected officials," and another for elected officials and all board and commission members that have filing obligations. This amounted to several hundred filers. However, there are privacy concerns that must be addressed with respect to accessing tens of thousands of state employees' SEI filings online. Some states require only certain high-ranking officials to file on-line, and even then, limit public access to the databases.

These considerations should be addressed by the Commission or the legislature through public hearings. Nonetheless, staff recommends that the Commission support the provision of this bill that allows for implementation of an online filing system for SEIs, provided that control of such a system remain solely with the Commission.

Staff recommendation: Oppose unless amended to provide only for the online filing of SEIs.